

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JAMES K. CURRY</b>	)	
Claimant	)	
VS.	)	
	)	
<b>DURHAM D &amp; M, LLC</b>	)	
Respondent	)	Docket No. 1,051,135
AND	)	
	)	
<b>OLD REPUBLIC INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the April 15, 2014, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on August 5, 2014, in Pittsburg, Kansas.

**APPEARANCES**

Roger D. Fincher of Topeka, Kansas, appeared for claimant. Kip A. Kubin of Leawood, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. The parties agreed that if the Board found claimant had compensable injuries, the Board could determine the nature and extent of claimant's disability.

**ISSUES**

This is a claim for injuries from a series of repetitive accidents. The ALJ found the symptoms claimant experienced were the natural and probable consequence of his original

traumatic injury on January 19, 2007, and there was insufficient evidence to establish claimant suffered additional personal injury by accident through repetitive trauma.

Claimant contends he suffered left knee and low back injuries from a series of repetitive accidents arising out of and in the course and scope of his employment with respondent. Claimant originally alleged a series of accidental injuries from January 5, 2008, to November 8, 2009, but later amended the date of accident to June 14, 2010, for the series of accidental injuries based upon a finding by the ALJ. Claimant asserts he has a 15% whole body functional impairment and a 60% work disability.

Respondent requests the Board affirm the Award. Respondent asserts claimant failed to prove he sustained a permanent functional impairment resulting from repetitive use. Respondent contends any permanent functional impairment sustained by claimant resulted from his 2007 work accident. Respondent next contends that if claimant sustained a permanent functional impairment as a result of his repetitive work activities, claimant's date of accident was not June 14, 2010, and he failed to provide timely notice.

The issue before the Board on this appeal is: did claimant prove he sustained low back and left knee permanent functional impairments as a result of his work activities after a traumatic injury that occurred on January 19, 2007?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant worked for respondent as a school bus driver. He worked 22 to 26 hours per week. Since 2005 or 2006, claimant has received Social Security disability benefits for fibromyalgia and short-term memory loss. On or about January 19, 2007, he slipped and fell on ice in respondent's parking lot as he was walking to his vehicle after work. Claimant was discharged by respondent in October or November 2009 for a personnel or disciplinary reason. He filed a claim in Docket No. 1,051,134 on June 14, 2010, claiming injuries to his chest, ribs, elbow, knees and low back. The claim in Docket No. 1,051,134 was denied in an August 12, 2010, preliminary hearing Order based on claimant not filing a timely application for hearing. The preliminary hearing Order in Docket No. 1,051,134 was never appealed and no further hearings have been held in that docket number. Docket No. 1,051,134 is currently inactive.

Claimant testified at the August 11, 2010, preliminary hearing that he injured both knees, his shoulder on the right side and his low back when he fell on the ice on January 19, 2007. Claimant testified that following the fall, he saw Dr. Mead. Claimant received conservative treatment consisting of prescription medications and physical

therapy. Claimant indicated he last saw Dr. Mead on March 23, 2007, and was released by the doctor to return to work without restrictions.

Claimant filed an Application for Hearing in this claim, Docket No. 1,051,135, on June 14, 2010, alleging back, knee, shoulder and rib injuries from a series of accidents from January 5, 2008, to November 8, 2009. The ALJ entered an Order for Compensation on August 12, 2010, in Docket No. 1,051,135. The ALJ found the claim compensable and found the accident date for the series of accidental injuries was June 14, 2010. Claimant filed an amended Application for Hearing on January 10, 2011. The date of accident was amended to "6/14/10 per ALJ Order of 8/12/2010."<sup>1</sup> The ALJ and, on appeal, the Board have entered several subsequent orders in this claim.

Claimant testified that from January 2008 until his last day worked, he suffered a work-related worsening of his left knee and low back conditions that originally resulted from his January 2007 fall. Sitting for long periods of time in the bus bothered him, as did driving on bumpy roads. Getting in and out of the bus caused his condition to worsen. He testified that he began using a cane sometime after his 2007 accident.<sup>2</sup> Claimant testified that during the period from January 2008 through November 2009, he was on several medications, including Lortab, Prednisone and Naprosyn. He was using his cane more toward the end of his employment and would use the cane to help him get into and out of the bus. He said he missed some work between January 2008 and his last day of work because of the pain in his back, knees or elbow, but he could not remember how many days. Claimant testified:

Q. Why did you allege that you had an accident from the beginning of '08 through November of '09 getting in and out of the truck or the bus?

A. The bus. At this particular time I don't remember the exact cause, but if I said I did, I did it. It happened. I don't remember at this time now what happened without something to show me.

Q. Okay. Well, I guess maybe a better question, did you have a worsening of your condition from January of '08 through November of '09?

A. That I did, yes.

Q. And was that worsening related to getting in and out of the vehicle?

A. Yes.

Q. And your other stuff you talked about at work?

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<sup>1</sup> Amended Application for Hearing (filed Jan. 10, 2011).

<sup>2</sup> P.H. Trans. (Aug. 11, 2010) at 32.

A. Yes. Plus the constant bouncing around. I don't know if you ever drove a bus or been on one, but they're not the most comfortable things anyway. And I drove what's called a minibus. It holds 23 or 24 passengers, and there's just not the suspension a bigger bus has. You hit something, you get jarred really well.<sup>3</sup>

On cross-examination, claimant testified:

Q. Mr. Curry, if I understand this correctly, what you're saying now in this claim is that [every day] that you worked up to the time that you were not working for Durham, you continued to injure yourself; is that right?

A. No, sir. I didn't say that.

Q. Well, are you saying that your condition got worse each day that you worked up to the time that you were terminated?

A. I'm not a doctor, but to me it felt like it was getting worse, yes.

Q. Is that what you're alleging today?

A. Yes.<sup>4</sup>

Claimant indicated that between January 2008 and his last day worked, he reported his back and knee hurt to respondent's safety training supervisor, Clinton Pepper. In January or February 2009, claimant asserted he asked Mr. Pepper to see someone about his back. Claimant testified that Mr. Pepper indicated respondent was not paying for anything else. He believed the last time he spoke with Mr. Pepper about his back was around Halloween 2009. Claimant also testified that during the period from January 2008 until his last day worked he presented some prescription bills to Mr. Pepper asking that they be paid, but the bills were not paid by respondent.

Mr. Pepper testified that to his knowledge, he was not told by claimant of injuring himself at work getting on and off the bus or riding on the bus. Mr. Pepper did remember claimant using a cane at work. Mr. Pepper testified:

Q. Mr. Curry has alleged that from 2008, beginning of 2008 to 2009 that he got worse doing his activities at work. Did he mention to you at times that his back was bothering him between early 2008 and November 2009?

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<sup>3</sup> *Id.* at 38-39.

<sup>4</sup> *Id.* at 45-46.

A. Not to my knowledge, no. He hadn't mentioned anything as far as he was in any pain or discomfort.<sup>5</sup>

Claimant was evaluated at the request of respondent by Dr. P. Brent Koprivica on October 19, 2011. Dr. Koprivica was aware claimant alleged a January 19, 2007, work accident, the claim was not timely filed and was not compensable. He also indicated claimant was not a reliable historian and could not provide injury dates or adequate descriptions of his injuries. In addition to taking a history, Dr. Koprivica physically examined claimant and reviewed his extensive medical records.

Dr. Koprivica testified he saw claimant on April 26, 1994, for low back, left knee and right shoulder injuries. The doctor indicated he assigned claimant a 5% whole body functional impairment for chronic low back pain and a 10% functional impairment for his left knee, which combined for a 9% whole body functional impairment.

Dr. Koprivica noted that in 2002, claimant sustained a work-related accident and sustained multiple injuries. Dr. Koprivica indicated Dr. Curtis diagnosed claimant with right hand, wrist, elbow, cervicothoracic spine, right knee and lumbosacral spine injuries and opined claimant had a whole body functional impairment. Dr. Koprivica noted that when claimant was evaluated by Dr. McKinney on December 5, 2005, he was being maintained on a number of medications, including Lortab. Dr. Koprivica noted that following claimant's 2002 accident, he was given restrictions by Drs. Curtis and McKinney. Claimant was diagnosed with a number of ailments, including chronic pain and muscular weakness in the arms and legs from possible steroid myopathy. Dr. Koprivica's report noted that in 2005, Dr. McKinney indicated claimant was using a cane to walk.

Dr. Koprivica concluded:

Based on the information I have available at this point, I do not believe that one can determine within a reasonable degree of medical certainty that Mr. Curry sustained any permanent injury based on the series of injuries from his employment activities with Durham School Bus Services as a bus driver through November of 2009.

In coming to this conclusion, first, in reference to the left knee, I would consider the direct injury to the knee that occurred in the fall in January of 2007 to be the significant injury to the knee.

Mr. Curry was driving an automatic school bus. Based on that history, I do not believe there is any significant exposure to risk which resulted in any permanent aggravation, acceleration or intensification of the impairment involving the left knee.

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<sup>5</sup> *Id.* at 87.

I would clearly point out that Mr. Curry was using a cane for gait assistance associated with his chronic back pain prior to the specific injury in January of 2007.

The MRI scan [taken November 3, 2010] does not show new internal derangement of significance. I would note this MRI scan was performed after his last date of exposure.

. . .

In terms of the lumbar spine, I would clearly point out that Mr. Curry had pre-existent overwhelming disabling pain with psychological contributions from a chronic pain syndrome that was diagnosed and ongoing prior to the work-related specific fall. Further, Mr. Curry was on chronic narcotics prior to this injury.

. . .

Second, I would note that the MRI scan of November 3, 2010, which is subsequent to the last date of exposure, is essentially a normal MRI scan. There is no significant degenerative disk disease identified on that study. There is no significant disk bulging to suggest annular tear either.

Although one can discuss possibilities, I do not believe that there is any evidence that Mr. Curry suffered cumulative injury from his ongoing bus driving activities in terms of the lumbar spine and terms of exposure through November 8, 2009, within a reasonable degree of medical certainty.<sup>6</sup>

At the ALJ's request, claimant was evaluated by Dr. Terrence Pratt on May 15, 2012. Dr. Pratt took claimant's history, physically examined claimant and reviewed his medical records. He testified claimant had giveaway weakness of the left knee during the examination, which is an indication of symptom magnification. Dr. Pratt also testified claimant's January 2007 slip and fall caused his knee problems. The doctor indicated claimant suffered a soft tissue low back injury as a result of the slip and fall in January 2007. Dr. Pratt indicated claimant reported his symptoms slightly worsened from his work activities after the 2007 fall. Dr. Pratt did not agree claimant's low back would probably have felt better following the 2007 accident had he not had to get in and out of the bus and bump up and down while driving the bus. The doctor pointed out that if that was true, claimant's back should have felt better between October 2009 and May 2012.<sup>7</sup> The doctor testified he would not add any additional impairment for claimant's reported slightly increased symptoms after the 2007 accident.

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<sup>6</sup> Koprivica Depo., Resp. Ex. B at 18-20.

<sup>7</sup> Claimant was terminated from his employment in October 2009 and saw Dr. Pratt in May 2012. During the intervening period, claimant was not employed.

Dr. Pratt determined claimant had a 5% whole person functional impairment for the lumbar spine and a 12% functional impairment for the left lower extremity. The doctor discussed preexisting impairment in his May 15, 2012, report. With regard to causation, Dr. Pratt opined:

There was a question concerning in some of the records repetitive activities or a specific event resulting in his involvement. His involvement of the knee and low back related to a specific vocationally related event in 2007. He reported some mild increase in symptoms after returning to work. I do not believe that those activities resulted in the involvement. The cause of his stated impairment was the reported fall.<sup>8</sup>

Dr. Pratt testified:

Q. What about his knee, was he alleging also that his knee got slightly worse over time getting in and out of the bus?

A. That's correct.

Q. And would that be the same sort of analysis, that if you take his history, a small portion of his problems that he's developed are related to getting in and out of the bus over time and the bumpiness over time and most of his problems are related to the initial fall?

A. That's correct.

Q. Is there any fair assessment you can come up with? Would it be like 90 percent of his permanent problems are related to the fall and then 10 percent related to the slight increase in his symptoms after that or is there some other number you believe would be appropriate?

A. No, there's no specific number for slight increase in symptoms that I could state to a reasonable degree of medical certainty.<sup>9</sup>

At a January 24, 2013, preliminary hearing, claimant again testified his left knee and low back conditions worsened between his January 2007 fall and November 2009. He indicated that bouncing in the bus, jumping out the emergency door for drills, getting in and out of the school bus and walking up and down the aisle were some of his work activities.

At the request of his counsel, claimant was evaluated by Dr. Edward J. Prostic on September 6, 2013. Dr. Prostic indicated claimant denied having any left knee issues or

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<sup>8</sup> Pratt Depo., Resp. Ex. B at 5.

<sup>9</sup> *Id.* at 15-16.

a low back impairment prior to his fall in January 2007. The doctor's report does not mention claimant's 1993 and 2002 accidents and injuries. The doctor indicated claimant sustained an initial accident in 2007 and repetitive injuries following that to his last day of work. Dr. Prostic's report noted claimant used a cane.

Dr. Prostic noted there was no weakness in claimant's legs and sensation was satisfactory. The doctor noted claimant's left knee alignment was satisfactory and there was no heat, swelling, erythema or atrophy. No left knee instability was noted and meniscal signs were negative except for joint line tenderness. The doctor indicated claimant had tenderness of the medial joint line and range of motion was complete with an audible snap in the last 15 degrees of flexion. Dr. Prostic assigned claimant a 10% whole body functional impairment for the lumbar spine and a 15% functional impairment for the left lower extremity, which combined for a 15% whole body functional impairment. The doctor indicated his rating was based upon the 2007 incident and continuing worsening injuries after that date until his last date worked.

On cross-examination, Dr. Prostic testified he reviewed the November 2010 lumbar spine and left knee MRI reports and acknowledged the lumbar spine MRI was within normal limits and the left knee MRI showed no significant abnormality. He also confirmed he did not review the medical records of Drs. Lowry Jones or Koprivica. Dr. Prostic indicated claimant had a psychological overlay that made it difficult to assess his true function. The doctor agreed claimant denied having any prior left knee or low back injuries. He also testified:

Q. He told you that he initially injured himself when he fell on ice on January 25th, 2007?

A. Yes.

Q. And then he told you that after that as he continued to work his condition got worse?

A. Yes.

Q. Would that be a natural and probable consequence of that original January 25th, 2007, injury?

A. Yes.<sup>10</sup>

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<sup>10</sup> Prostic Depo. at 14-15.



PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>11</sup> “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>12</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability.<sup>13</sup>

Claimant sustained left knee and low back injuries in a January 2007 fall. He asserts his left knee and low back conditions were aggravated by his work activities after that fall, resulting in a permanent functional impairment. The medical evidence in the record does not support claimant’s claim.

The opinions of claimant’s expert, Dr. Prostic, are flawed. Dr. Prostic was not informed by claimant of having prior left knee or low back injuries. Nor did Dr. Prostic have the medical records of Drs. Jones and Koprivica. Dr. Prostic reviewed the November 2010 lumbar spine and left knee MRI reports and acknowledged the lumbar spine MRI was within normal limits and the left knee MRI showed no significant abnormality. He indicated claimant had a psychological overlay that made it difficult to assess his true function. Despite the foregoing, Dr. Prostic opined claimant sustained permanent functional impairments of the left knee and low back. The doctor concluded claimant’s functional impairments resulted from his 2007 incident **and** continuing worsening injuries after that date until his last date worked. Dr. Prostic then muddled the water further by agreeing on cross-examination that claimant’s left knee and low back conditions were the natural and probable consequence of his 2007 fall.

Dr. Pratt assigned claimant functional impairments for his left knee and low back. Dr. Pratt indicated claimant’s left knee and low back functional impairments resulted from claimant’s 2007 fall. Dr. Pratt testified he could not separate out within a reasonable degree of medical certainty what portion of claimant’s functional impairment resulted from the 2007 fall and what resulted from his subsequent work activities. The doctor testified he would not add any additional permanent impairment for claimant’s reported slightly increased symptoms after the 2007 accident.

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<sup>11</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>12</sup> K.S.A. 2009 Supp. 44-508(g).

<sup>13</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

The Board finds Dr. Koprivica's opinions the most credible. He examined claimant after his 1993 accident and provided claimant left knee and low back functional impairment ratings in 1994. The doctor was aware claimant sustained another lumbosacral spine injury in 2002. Dr. Koprivica determined claimant's November 2010 left knee MRI showed no new internal derangement and his November 2010 lumbar spine MRI was essentially normal. Dr. Koprivica knew the nature of claimant's work activities after the 2007 accident, and concluded claimant did not sustain any permanent injury as a result of those work activities.

Several other facts support respondent's contention that claimant did not sustain a permanent functional impairment as a result of the work activities he performed after his January 19, 2007, injury. Claimant sustained left knee and low back injuries in 1993 for which he received functional impairment ratings. He sustained another low back injury in 2002 and again received a functional impairment rating. Claimant testified he began using a cane after his 2007 fall. Dr. Koprivica's review of claimant's medical records indicated he was using a cane in 2005. Mr. Pepper testified that between January 2008 and November 2009, he never heard claimant make any complaints his back was bothering him.

The Board finds claimant failed to prove he sustained a left knee or low back permanent functional impairment as a result of the work activities he performed after his January 19, 2007, injury. While claimant's pain symptoms may have increased, there is insufficient evidence to show his functional impairment increased. Claimant failed to prove his repetitive work activities after January 19, 2007, resulted in a permanent functional impairment regardless of his date of accident.

### **CONCLUSION**

Claimant failed to prove he sustained a left knee or low back permanent functional impairment as a result of the work activities he performed after his January 19, 2007, injury.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>14</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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<sup>14</sup> K.S.A. 2013 Supp. 44-555c(j).

**AWARD**

**WHEREFORE**, the Board affirms the April 15, 2014, Award entered by ALJ Avery.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
rdfincher@ksjustice.com; debbieb@ksjustice.com; heather@ksjustice.com

Kip A. Kubin, Attorney for Respondent and its Insurance Carrier  
kak@kc-lawyers.com; cdb@kc-lawyers.com

Honorable Brad E. Avery, Administrative Law Judge